IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 994

CEDAR RAPIDS STEEL TRANSPORTATION, INC., *Petitioner*

v.

IOWA STATE COMMERCE COMMISSION, ROCK ISLAND MOTOR TRANSIT, H & W MOTOR EXPRESS, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

Joint Brief in Opposition for Respondents, Iowa State Commerce Commission, Rock Island Motor Transit and H & W Motor Express

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February 26, 1969.

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OPINIONS BELOW

The opinion of the Supreme Court of Iowa (Pet. App. B, pp. 27-47) is reported at 260 Iowa , 160 N.W. 2d 825. The Order of the Supreme Court of Iowa denying rehearing without comment is not re-

ported nor printed in the Petition for Writ of Certiorari. The Opinion of the District Court of the State of Iowa (Linn County) is printed in Appendix B to the Petition for Writ of Certiorari (pp. 18-26). The Orders of the Iowa State Commerce Commission are printed in Appendix B to the Petition for Writ of Certiorari (pp. 13-17).

JURISDICTION

The judgment of the Supreme Court of Iowa was entered on September 5, 1968 (Pet. App. B, p. 27). Rehearing was denied on November 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether state legislation providing for different methods of review, for separate, distinct classes of carriers is violative of the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States.

2. Whether, after lower court review of an administrative order and State Supreme Court review of the lower court's opinion, the attempt to raise supposed federal questions for the first time in a petition for Rehearing in the State Supreme Court constitutes timely presentation and preservation of a federal question so as to give this court jurisdiction.

3. Whether the Iowa Supreme Court's refusal to allow a lower court to review de novo the Orders of the Iowa State Commerce Commission deprives Petitioner of due process and equal protection of the laws in contravention of the provisions of the Fourteenth Amend-

ment to the Constitution of the United States when the lower court based its de novo review upon a statute exclusively applicable to another class of carrier (Section 474.28, Code of Iowa,) and upon its equitable powers as modified by Rules of Civil Procedure (Rules 320, et seq., Iowa Rules of Civil Procedures). (Pet. App. B. p. 25).

4. Whether the mere notation in an Order of the Iowa State Commerce Commission as to the Commission's knowledge of other things is sufficient to deprive Petitioner of due process in contravention of the Fourteenth Amendment to the Constitution of the United States in view of substantial evidence in the Record to support Commission findings.

STATUTES INVOLVED

The relevant portion of the Fourteenth Amendment to the Constitution of the United States is printed on page 3 of the Petition for a Writ of Certiorari. Certain statutes and a rule which Petitioner considers involved are printed in Appendix A to the Petition for Writ of Certiorari (pp. 11-12). Other statutes involved are printed in Appendix A hereto.

STATEMENT

1. The Petitioner

Petitioner is engaged in providing transportation to the public for hire and is a member of the class of carriers designated by Chapter 327, Code of Iowa, as Truck Operators and is the holder of a Truck Operator permit issued by the Iowa State Commerce Commission (R. p. 216, ll. 24-30). Petitioner's general office is located in Cedar Rapids, Iowa, and in 1963 it instituted and actively solicited intrastate traffic and pro-

vided irregular route less-than-truck-load service in a preferred territory comprising approximately the eastern half of the State of Iowa. (R. pp. 42-44).

2. Proceedings Before the Iowa State Commerce Commission

In 1963 the Iowa State Commerce Commission, pursuant to statutory authority, instituted an investigation of the Petitioner's intrastate operations and upon completion of the investigation, the Commission, by resolution and notice provided Petitioner with an opportunity to show cause why its Iowa Truck operator permit should not be revoked. (R. pp. 4-6). The Commission, after hearing in which Petitioner participated fully, found, by Order dated March 9, 1964, that Petitioner was conducting operations in the manner of that class of carrier designated by statute as a Motor Carrier in violation, of Chapter 325, Code of Iowa, and ordered Petitioner to "cease and desist" performing such unauthorized service. (Pet. App. B. pp. 13-15). The Commission, again pursuant to resolutions and notice, attempted to hold a second hearing in June 1964, to allow Petitioner an opportunity to show cause why its Iowa truck operator permit should not be revoked. (R. pp. 127-128; 141). Upon Petition, the Commission was temporarily enjoined from holding this second hearing by the District Court of Iowa for Linn County (R. pp. 138-140; 142). The Linn County District Court, after hearing, by ruling dated July 10, 1964, dissolved the temporary injunction previously issued and the Commission, again pursuant to notice, held the second hearing in August 1964. (R. p. 142). The Commission after hearing in which Petitioner participated fully, found that Petitioner continued to be in violation of Chapter 325, Code of Iowa,

and ordered the Petitioner's Truck Operator Permit revoked (Pet. App. B, pp. 16-17). No application for rehearing was filed with the Commission.

3. Proceedings Before the District Court for Linn County, Iowa

Petitioner brought two separate actions in the District Court for Linn County, Iowa, challenging the Cease and Desist Order and the Revocation Order. Petitioner filed its first petition, consisting of two divisions, in regard to the Cease and Desist Order on June 1, 1964. The first division prayed for the issuance of a Writ of Certiorari, the second division asked general equitable relief. (R. pp. 130-134). The Petitioner filed the second petition consisting of three divisions on January 7, 1965, in regard to the Commission's Revocation Order. The first division asked for issuance of a writ of certiorari and also asked for a stay of the Commission Order pending determination by the court. The Second division alleged that it was entitled to review of the Commission's Order under provisions of Section 474.28, Code of Iowa, and asked the court to find the Commission Order to be unreasonable, unjust, in excess of jurisdiction, and null and void. In addition, Petitioner requested a temporary injunction staying the effective date of the Commission Order until determination by the court. The third division asked for general equitable relief and also for a temporary and permanent injunction enjoining enforcement of the Commission Order. (R. pp. 196-202).

On January 7, 1965, the District Court entered an Order temporarily restraining enforcement of the Commission Revocation Order and on January 25, 1965, after hearing, entered an Order continuing the stay until determination of the causes, directing issu-

ance of a writ of certiorari and consolidating the causes for trial. (R. p. 203).

The District Court rendered its decision on December 12, 1966, finding in certiorari that the Commission acted arbitrarily, capriciously and unlawfully in failing to follow Commission rules and procedure, in issuing the Cease and Desist Order and the Revocation Order, in failing to set forth what would constitute a lawful operation for Petitioner, in failing to properly apply the law set forth in existing Iowa cases, in relying on "other things of which the Commission had knowledge", and that the Commission was biased. In the other divisions the District Court concluded, inter alia, that under Section 474.28, Iowa Code, it could effect a de novo review of the Commission's Orders and that upon suit for injunction the District Court was required to make a de novo review. The Commission's Cease and Desist Order and Revocation Order were declared null and void, and the Revocation Order permanently enjoined. (Pet. App. B, pp. 18-26).

4. The Iowa Supreme Court's Reversal of the District Court and Affirmance of the Commission's Orders

The Iowa Supreme Court, after full argument on oral submission of the case, in a unanimous opinion on September 5, 1968, reversed the District Court and affirmed the Commission's Orders (Pet. App. B, pp. 27-47).

The Iowa Supreme Court first examined the nature of Petitioner's pleadings, in both cases, and observed that the relief sought was that "basically obtainable in certiorari, aided by injunctive relief as an auxiliary remedy." (Pet. App. B, p. 30). With respect to Petitioner's allegation that it was entitled to review of the

Commission's Orders, under Section 474.28, Code of Iowa, the Iowa Supreme Court disagreed with the District Court and held that Section 474.28 did not apply. The Supreme Court noted:

> "The aforesaid statute is clearly confined to 'any railroad' aggrieved by a rule, order or regulation made by defendant commission. Petitioner fails to so qualify."
>
> "To give Section 474.28 the construction accorded it by trial court would require reading into that statute an intent and a meaning not therein expressed. The courts of this state do not possess any such prerogative." (Pet. App. B, pp. 30-31).

The Iowa Supreme Court also noted that the "right of appeal is purely a creature of statute" (Pet. App. B, p. 31), and that the statute under which Petitioner's permit was issued does not provide for appellate review. (Pet. App. B, p. 31).

The Supreme Court observed, however, that "absence of statutory right of appeal does not serve to deprive Petitioner of any judicial review," (Pet. App. B, p. 32) and held that "Petitioner's actions stand in certiorari and trial court erred in reviewing de novo respondent's 'cease and desist' and 'revocation' orders" (Pet. App. B, p. 33). With respect to the District Court's holding that the recitation of the phrase "and other things of which it had knowledge" in the Commission's Order and what the District Court considered the apparent reliance thereon was reversibel error (incidentally, never specifically raised as error in any of Petitioner's pleadings in the District Court (R. pp. 130-141; 196-202), the Iowa Supreme Court after stating:

> "The record before us is replete with evidence obtained in the course of the prehearing investiga-

> tions. In addition Petitioner was allowed reasonable opportunity to cross-examine all persons called as witnesses, including investigating officers, and to offer any evidence it desired. Petitioner was accorded every reasonable opportunity not only to meet, overcome, refute, explain or rebut all adverse testimony, but also to present any evidence favorable to its position. Full play was accorded our commonly accepted judicial practice in adversary proceedings."

(Pet. App. B, p. 41), conceded that the use of the questioned phrase was inappropriate and the Supreme Court of Iowa observed" . . . While use of the quoted or similar phraseology is disapproved in cases such as those at bar, we are satisfied it was here of little or no significance. In other words, it may constitute error, but under existing circumstances does not justify relief in the case at bar." (Pet. App. B, p. 42).

Petition for Rehearing was filed with the Iowa Supreme Court by the Petitioner herein and it was not until this point in the proceedings that the Petitioner first attempted to raise the constitutional issues, this Court is now asked to determine. The Iowa Supreme Court denied rehearing without comment.

ARGUMENT

1. The Petitioner first attempted to raise the constitutional questions presented herein by means of a Petition for Rehearing before the Iowa Supreme Court. The attempt to raise the questions at that late date was contrary to the repeated pronouncements of the Iowa Supreme Court that constitutional questions not raised below will not be considered. *Heinrichs* v. *Iowa State Highway Commission*, Iowa , 152 N.W. 2d 248 (1967); *Farmers Elevator Co.* v. *Chicago*

R.I. & P.R. Co., Iowa , 149 N.W. 2d 867 (1967); *Vershoor* v. *Miller*, Iowa, 143 N.W. 2d 385 (1966). Therefore, the Supreme Court of Iowa neither considered nor spoke to the constitutional questions raised for the first time on rehearing. The general rule in this regard as articulated in *Great Northern R.C.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932) is:

> ". . . That a constitutional question is urged too late if put forward for the first time upon a petition for rehearing . . ."

(See also *Live Oaks Water Assoc.* v. *Railroad Commission*, 269 U.S. 354 46 S.Ct. 149, 70 L.Ed. 305 (1926). Although, as with most rules of a general nature, an exception to this rule exists if the issues attempted to be raised on a petition for rehearing could not have been reasonably anticipated prior to decision, the Petitioner here could have, and should have, anticipated these issues prior to submission to the lower court since it would have been reasonable to assume that the lower court's decision may have been adverse to it. The grounds of the Iowa Supreme Court's decision do not supply a new or unexpected basis for the constitutional issues which Petitioner attempts to raise and they should be given no consideration by this Court.

2. Petitioner's claim that it has been denied due process of law and the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States because it does not have available to it the same method of review of Commission orders as another class of carriers is untenable. That the State of Iowa may classify carriers into different types and regulate them in a different manner goes without saying. *Iowa Mortor Vehicle Ass'n* v. *Board of Rail-*

road Commissioners, 207 Iowa 461, 221 N.W. 364 (1928), aff'd. 280 U.S. 529, 50 S.Ct. 151, 74 L.Ed. 595, (this case presented a question with respect to the classification of carriers including that class presently regulated under Chapter 327, Code of Iowa, to which Petitioner belongs). The distinctions between method of operation of carriers made in this case make it abundantly clear that distinctions can also be reasonably drawn between carriers which operate by highway and those which operate by rail. The Petitioner's attempt to place itself pari causa with another class of carrier should fail for, as the Iowa Supreme Court pointed out, it fails to qualify as a member of that class of carriers for which review is provided in Section 474.28, Code of Iowa (Pet. App. B, pp. 30-32), nor has this Court ever held that ". . . The states are required to establish avenues of appellate review . . ." *Rinaldi* v. *Yeager,* 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed. 2nd 577 (1966), at 384 U.S. 308. The equal protection of the laws to which the Petitioner is entitled under the federal constitution is that it be treated equally or on a par with the members of the same class of carriers to which it belongs. The Petitioner is deprived of neither due process of law nor equal protection of the laws under the federal constitution if it is not afforded the same privileges or remedies available to members of another separate, distinct class. *McGowan* v. *Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2nd 393 (1961); *Iowa Motor Vehicle Ass'n, et al.* v. *Board of Railroad Comm'rs et al.,* 207 Iowa 461, 221 N.W. 364 (1928), aff'd 280 U.S. 529, 50 S.Ct. 151, 74 L.Ed. 595.

The Legislature of Iowa has a wide latitude of discretion in making classifications of carriers and it may

validly classify based upon the manner or method of operation or equipment or by any other means where the classification is based upon real differences. *Iowa Motor Vehicle Ass'n et al.* v. *Board of Railroad Comm'rs et al.*, 207 Iowa 461, 221 N.W. 364 (1928), aff'd 280 U.S. 529, 50 S.Ct. 151, 74 L.Ed. 595.

In making the classification, the Iowa Legislature may, for purposes of regulation, provide different rules for different classes or extend to some classes privileges denied to others. The Legislature may within this wide discretion prescribe different remedies or rights for different classes or grant different methods of appeal or review for different classes without violating the prohibitions of the Fourteenth Amendment to the United States Constitution. The Petitioner should resort to the Iowa Legislature, not this Court, for change in the method of review of the orders of the Commission affecting the class of carrier to which it belongs.

3. The decision of the Iowa Supreme Court was based on an interpretation of a state statute regulating carriers within the state and this Court has repeatedly pronounced that it is bound by state appellate court interpretations of state statutes. *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932). The substantive law as applied by the Iowa Supreme Court in the case at bar was consistent with prior determinations by that court.

Arrow Express Forwarding Co. v. *Iowa State Commerce Commission*, 256 Iowa 1088, 130 N.W. 2d 451 (1964); *Peterson* v. *Iowa State Commerce Commission*, 256 Iowa 964, 129 N.W. 2d 656 (1964); *Sherman* v. *Iowa State Commerce Commission*, 253 Iowa 776, 113

N.W. 2d 715 (1962); *Wood* v. *Iowa State Commerce Commission*, 253 Iowa 797, 113 N.W. 2d 710 (1962); *Circle Express Co.* v. *Iowa State Commerce Commission*, 249 Iowa 651, 86 N.W. 2d 888 (1957).

4. As a second ground for granting the writ of certiorari wherein Petitioner advances the proposition that the Iowa Supreme Court's finding that the Commission's use of the phrase "and other things of which it has knowledge" may constitute error but does not do so in the present case is a denial of due process of the Fourteenth Amendment to the Constitution of the United States.

Petitioner cites *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937), as an example for extra-record procedure and resultant court disapproval. The *Ohio Bell* case, *supra*, never cited to the Iowa Supreme Court until Petition for Rehearing, bears striking resemblance to the Iowa case of *In re Lone Tree Community School District*, Iowa , 150 N.W. 2d 637 (1967), on which Petitioner relied in brief and argument to the Iowa Supreme Court. (Pet. App. B, p. 41). The *Ohio Bell* case, like the *Lone Tree* case, *supra*, is readily distinguishable on its facts. In the *Ohio Bell* case the Commission ordered refunds on the basis of facts not spread on the record. In the case at bar the record is replete with evidence obtained by investigation and presented at hearing for the Petitioner to refute. Petitioner failed to so do. (Pet. App. B, p. 41). Petitioner participated fully in the development of this record, cross-examining witnesses and offering evidence. Petitioner "was accorded every reasonable opportunity not only to meet, overcome, refute, explain or rebut all adverse testimony, but also to present any evidence favorable to its position. Full

play was accorded our commonly accepted judicial practice in adversary proceedings." (Pet. App. B, p. 41). *U. S.* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 90 L.Ed. 821, 66 S.Ct. 687 (1945).

CONCLUSION

The effect of the Iowa Supreme Court's opinion in this case was nothing more than an admonition to the class of carriers designated by the Iowa Legislature as Truck Operators to remain in their sphere and to refrain from encroaching on the field of service reserved by the Iowa statutes for other classes of carriers. The decision of the Iowa Supreme Court is correct, there is no conflict of decisions, no further review by this Court of the Iowa Supreme Court's decision is, therefore, required. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Statutes

325.1 *Definitions.* When used in this Chapter:

1. The term "motor vehicle" shall mean any automobile, automobile truck, motorbus, or other self-propelled vehicle, including any trailer, semitrailer, or other device used in connection therewith not operated upon fixed rails or track, used for the public transportation of freight or passengers for compensation between fixed termini, or over a regular route, even though there may be occasional, periodic, or irregular departures from such termini or route, except those owned by school corporations or used exclusively in conveying school children to and from schools.

2. The term "motor carrier" shall mean any person operating any motor vehicle upon any highway in this state.

3. The term "highway" shall mean every street, road, bridge, or thoroughfare of any kind in this state.

4. The term "commission" shall mean the Iowa state commerce commission.

5. The term "charter" means the agreement whereby the owner of a motorbus lets the same to a group of persons as one party for a specified sum and for a specified act of transportation at a specified time and over an irregular route.

6. The term "charter carrier" means a person who engages in the business of transporting the public by motorbuses under charter. The term "charter carrier" shall not be construed to include taxicabs or persons, firms or corporations having a license, contract or franchise with an Iowa municipality with a population of more than fifteen thousand people as shown by the last federal decennial census, to carry or transport passengers for hire, or a

municipality with a population of more than fifteen thousand people as shown by the last federal decennial census, engaged in the business of carrying or transporting passengers for hire, provided, however, that municipality or the person, firm or corporation having a license, contract or franchise with an Iowa municipality comply with sections 325.26, 325.28, 325.29, 325.31 and 325.35, or school bus operators when engaged in transportation involving any school activity or regular route common carriers of passengers.

325.6 *Certificate of convenience and necessity.* It is hereby declared unlawful for any motor carrier to transport over a regular route or between fixed termini any person or property, for compensation, from any point or place in the state of Iowa to another point or place in said state irrespective of the route, highway or highways traversed, including the crossing of any state line of the state of Iowa, or the ticket or bill of lading issued and used for such transportation, without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation. No carrier of passengers shall operate as a charter carrier in this state unless already possessed of a certificate of convenience and necessity as a common carrier of passengers and operating in this state as such common carrier or possesses a certificate of convenience and necessity to engage in the business of a charter carrier.

474.18 *Investigation and Inquiry.* The commission shall investigate and inquire into the management of the business of all common carriers subject to the jurisdiction of said commission and keep itself well informed as to the manner and method in which the same is conducted. It shall have the right to obtain from them full and complete information necessary to enable the commission to perform its duties. It shall have power to require the attendance and testimony of witnesses, the production of all books,

papers, tariff schedules, contracts, agreements, and documents, relating to any matter under investigation, and to inspect the same and to examine under oath or otherwise any officer, director, agent, or employee of any common carrier; to issue subpoenas and to enforce obedience thereto.

Rules of Civil Procedure

306. *When writ may issue.* A writ of certiorari shall only be granted when specifically authorized by statute; or where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded its, or his proper jurisdiction or otherwise acted illegally.